

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Md. Nizamuddin.

GA 6 of 2020
With
CS 467 of 1978
APD 63 of 2013

State of Rajasthan & Anr.
Vs.
I. K. Merchants Limited & Ors.

For the Appellant : **Mr. Malay Kumar Ghosh, Sr. Adv**
Ms. Nilanjana Adhya,
Mr. Atish Ghosh,
Mr. Souvik Ghosh. Adv

For the Respondent : **Mr. Siddhartha Mitra, Sr. Adv,**
Mr. Sudip Deb,
Mr. Deepak Jain,

For the Respondent 11(6) : **Mr. Aniruddha Poddar,**
Mr. Anurag Bagaria.

Judgment on : **28.04.2021.**

I. P. MUKERJI, J.-

The respondents/plaintiffs, in the early 70s, held ordinary shares in a company Bikaner Gypsums Ltd (the company).

The company, for its operation, increasingly became dependent on the appellant No.1/defendant no.1 (the appellant) for loans, advances and other forms of assistance. The latter accommodated them but insisted that it should have more control over it and that it should become a public sector undertaking. It informed the share holders of the company about its intention to buy their shares. A vast majority of them agreed to sell their shares. By April, 1973 the appellant had acquired 50% of the company's issued and paid up share capital and by 14th June, 1973, 97% of its issued share capital. The Company's name was changed to Rajasthan State Mines and Minerals Ltd, the appellant No.2/Defendant No.2.

The agreement between the parties was that the consideration for the sale of the shares would be determined by a reputed valuer to be nominated by the Institute of Chartered Accountants. Immediately, the face value of Rs.10/- per share would be paid to the shareholders and the balance amount would be paid on determination of their value. Rs.5,58,780/- (Rs.6,53,780/- in the amended plaint) was received by the respondents/plaintiffs as such consideration in 1973.

The subject matter of dispute between the parties in this proceeding is with regard to the valuation of those shares. The appellant declared that these shares had been valued at Rs.11.50/- per share. It had been made by M/s B. D. Gargieya & Co., Jaipur a firm of Chartered Accountants nominated by it. Only the difference between Rs.11.50 and the face value of Rs.10/- per share was payable. This valuation, on its finalization, was communicated to them on 8th July, 1975, according to the respondents.

The respondents/plaintiffs contend that Rs.11.50 per share could not have been the market price of or a fair value of each share on the date of its sale. It was Rs.795.60/- per share. The agreement did not permit M/s B. D. Gargieya & Co., Jaipur to value the shares. The decision of the appellant regarding valuation and the whole process of it have been challenged in this proceeding.

Now, some relevant facts need to be stated.

By his letter dated 3rd/5th April, 1974 the Deputy Secretary to the Government of Rajasthan wrote to the Managing Director of the Company that the institute of Chartered Accountants did not appoint valuers and that the government had appointed M/S B. D. Gargieya & Co., Jaipur to value the shares. On 22nd April, 1974 the Managing Director wrote to the shareholders that according to his information from the Government of Rajasthan, the valuers were expected to submit their report to the state government by 31st May, 1974. The value would accordingly be intimated to them. On 21st May, 1974 one of the shareholders wrote to the Managing

Director that they would like to be represented before the valuer before the valuation was made. On 3rd July, 1974 the government wrote a stern letter to the Managing Director of the company stating that the valuer would have to submit their report according to the principles of valuation. Their report would be an advice to the state government. The exercise of valuation was not an arbitration and that there was no question of any representation before the valuer. On 31st October, 1974 the government wrote to the Managing Director that the valuation report as submitted by the firm M/s. B. D. Gargieya & Co., had been accepted by the government. First, the difference between the value arrived at by the valuer and the face value which had been paid, (Rs.11.50 – Rs.10.00 = Rs.1.50) would be paid per share to the shareholders. On 18th December, 1974 the Managing Director wrote to one shareholder that the government was taking steps for payment of the balance amount.

On 17th January, 1975 one of the shareholders of the company wrote to the Managing Director of the company that they failed to understand how the valuation made by the valuer was so low. Again on 10th April, 1975 one shareholder wrote to him with a copy to the Government of Rajasthan alleging breach of the agreement by the government in fixing the value of the shares at Rs.11.50 per share without giving an opportunity to the shareholders to make their representation before the valuer.

By their letter dated 10th April, 1975 some of the shareholders of the company wrote to its Managing Director that in fixing the value of each share at Rs.11.50/-, the government of Rajasthan had acted in breach of the agreement. Furthermore, the value had been determined without giving them an opportunity to represent the true facts. The method which the valuer adopted was not made known to them. They said that they did not agree to the valuation and that it was not binding upon them.

On 8th July, 1975, the appellant paid Rs.11.50 per share to each shareholder.

On 12th August, 1975 one of the shareholders wrote to the appellant No. 2 that the difference amount was being received under protest without prejudice to their rights and contentions.

By his letter dated 15th January, 1977 the Deputy Secretary, Finance Department to the Government of Rajasthan told M/s. B. D. Gargieya & Co. that their report dated 28th August, 1974 was accepted by the government and on that basis, Rs.1.50 per share was paid to the shareholders. The objections of the shareholders were narrated in the letter with instructions to the Chartered Accountant whether those points deserved consideration for review of their decision. On 25th January, 1977 the said firm replied that there was no scope of reconsideration of their decision taken.

By amending the original plaint, the respondents/plaintiffs ran the case that they entered into this agreement on the understanding that they should be paid the market value of the shares. From the start the appellant never intended to pay this amount to them. Under the terms of the agreement a Chartered Accountant nominated by the Institute of Chartered Accountants was to do the valuation. Acting on the above intention and in breach of the agreement, the appellant had engaged M/s B. D. Gargieya & Co. to value the shares at a throw away price. They had done such valuation most erroneously and without following the due procedure. There was failure of consideration. Hence the agreement was avoidable and rescinded by them. The respondents/plaintiffs claimed restitution to their original position.

Alternatively they claimed a decree for Rs.4,34,21,553/- being the difference between the price which the respondents/plaintiffs ought to have received and the price of the shares actually received that is, [Rs.795.60 – Rs.11.50] per share or alternatively Rs.1,43,52,222/- from the appellant no. 1/defendant no.1.

In their written statement the appellants stated as follows:

- a) There was no provision in the agreement between the parties that the valuer would be appointed upon notice to the share holders of the company. Neither did the appellant make any representation to them that they would be allowed to participate in the valuation process.
- b) The appellant requested the Institute of Chartered Accountants of India at New Delhi to send a list of share valuers to them to value the subject shares. On 9th July, 1973 the Institute replied that they did not have any list of share valuers practicing in Rajasthan or Delhi and suggested the appellant to approach the Central Board of Direct Taxes, Government of India, Ministry of Finance, New Delhi for such purpose. The Board send them a list of such valuers from which M/s. B. D. Gargieya & Co. were appointed to value the shares. They did so valuing the shares at Rs.11.50/- per share on the date of sale. In terms of this valuation the appellant paid Rs.83,087/- to the company.

ISSUES

On 28th June, 2002 the following issues were framed by this Court:

1. Is the suit maintainable in its present form and frame?
2. Is the suit bad for mis-joinder of parties and causes of action?
3. Is the suit barred by limitation?
4. (a) Is the valuation made by M/s. B.D. Gargieya & Co. is bad and not binding on the plaintiffs?
(b) Is the appointment of M/s. B.D. Gargieya & Co. as an independent valuer improper and perverse as alleged?
(c) Was there any breach of terms as regards appointment of an independent valuer for valuing the controlling block of shares?
5. Are not the plaintiffs entitled to Rs.795.60/- per share in respect of the shares in the defendant no. 2 towards and/or by way of compensation/value at the relevant time as pleaded in paragraphs 12 and 15 of the plaint?
6. Are not the plaintiffs entitled to claim restitution of original status and transfer back of the controlling block of shares in absence of payment of the fair value of the same as pleaded in paragraph 19A of the plaint. Thus constituting breach of contract?
7. Is the transfer of shares belonging to the plaintiffs to the defendant no. 1 cancelled and/or set aside?

8. Are the plaintiffs entitled to get a decree? If so, for what amount and to what other relief or reliefs are the plaintiffs entitled?”

All issues including the one relating to limitation were tried together by the learned single judge. He pronounced a preliminary judgment and decree on 14th August, 2012.

The issue of limitation was discussed and decided by his lordship in the following manner:

“.....As far as the question of limitation is concerned, on a combined reading of all the relevant letters exchanged between the parties, namely dated 2 January 1975, 17 January 1975, 10 April 1975, 4 August 1975, 15 January 1977, 25 January 1977 and also the relevant provisions of the Limitation Act in particular Section 19 thereof, I do not think that it can at all be said that the claim or claims made by the plaintiffs were barred by limitation on the date of the institution of the suit at all. Since I am not at all impressed with the plea of limitation raised by or rather on behalf of the defendants on a plain reading of the letters exchanged between the parties, I do not think it necessary to spend time for ascertaining whether the claims made by the plaintiffs, or rather the suit of the plaintiffs was barred on the date of its institution.”

The court did not accept the valuation of the respondents/plaintiffs at Rs.795.60/- per share. It neither concurred with the valuation made by the appellant.

It decreed the suit by passing a preliminary decree directing the appellant to appoint anyone of the three firms of Chartered Accountants, Price Waterhouse, Ray & Ray, Lodha & Company as valuer for the purpose of determining the value of the shares. Thereafter, the respondents/plaintiffs were given the liberty to apply in the suit for a final decree for the amount found due on such enquiry.

The appellants were dissatisfied with this decree and preferred the instant appeal.

The respondents/plaintiffs were also aggrieved by the decree. They wanted the share valuation at the rate their expert had done @Rs.795.60/- per share. They would take nothing short of that amount. They filed a cross objection against the decree.

At the interlocutory stages of the appeal the appellate court tried to forge a kind of settlement between the parties. It appointed M/s. Ray and Ray, Chartered Accountants to value the shares. It appears from the records of the proceedings that learned counsel appearing for the parties on instruction had accepted the proposal of the court to get the shares valued by this firm. It goes without saying that it was also understood, expressly or impliedly that the valuation made by the firm would be accepted by both the parties.

The orders of the Appeal Court dated 20th August, 2019, 27th September, 2019, 6th December, 2019, 14th February, 2020 and 6th March, 2020 are set out below:

“Date : 20th August, 2019.

The Court: We have heard the learned Counsel for the parties.

The dispute is essentially with regard to the valuation of the shares. The learned Single Judge did not accept the valuation of either of the parties and has passed a preliminary decree directing the defendants, in particular the first defendant, to appoint anyone of the following firms of Chartered Accountants, namely, Price Water House, Ray & Ray, Lodha and Company of its choice as the valuer for the purpose of conducting an enquiry for ascertaining the fair and proper value of the shares of the plaintiffs at the time when such shares were transferred to the first defendant by the plaintiffs and upon conclusion of such enquiry the plaintiffs shall be entitled to apply in the suit for obtaining a final decree for the amount, if found, due upon such enquiry.

Since the dispute is essentially with regard to the valuation of shares, we appoint Ray & Ray, Ground Floor, Webel Bhawan, Block EP & GP, Salt Lake City, Sector-5, Kolkata-700091 as valuer for the purpose of conducting an enquiry for ascertaining the fair and proper value of the shares of the plaintiffs at the time when such shares were transferred to the first defendant by the plaintiffs and file a report to that effect uninfluenced by the earlier reports.

The parties shall, within ten days from date, file all necessary documents with the said valuer including the valuation reports prepared by the valuers appointed by the parties and relied upon by them before the learned Single Judge. The parties shall be at liberty to make appropriate representation before the valuer.

The valuer shall file its report in a sealed envelope on or before 20th September, 2019. The cost, charges and expenses shall be borne by the parties in equal share, subjected to any final order that may be passed at the time of disposal of the appeal.

The matter shall appear on 24th September, 2019 and is treated as part-heard.”

“Date : 27th September, 2019.

The Court : The appellants have not complied with our direction passed on 20th August, 2019. Mr. Malay Kumar Ghosh, learned Senior Counsel appearing on behalf of the appellant has submitted that a last chance may be given to the appellant to produce the required documents before the valuer appointed by us on 20th August, 2019.

Under such circumstances, we peremptorily extend the period till 31st October, 2019; failing which the valuer will be directed to proceed with the valuation of the shares on the basis of the documents already produced by some of the decree-holders. The valuer, in such case, shall proceed with the valuation of the shares upon notice to the Advocate-on-records of the parties and shall conclude the proceedings within the time stipulated by this order. The time to file the report by the valuer is extended till 6th December, 2019.

Let this matter appear on 6th December 2019 at 2:00 PM.”

“Date : 6th December, 2019.

The Court : On the basis of the agreement reached by and between the parties that a valuer should be appointed to value the shares of the plaintiffs at the time when such shares were transferred to the first defendant by the plaintiffs, we appointed M/s. Ray & Ray, a reputed Chartered Accountant firm by an order dated 20th August, 2019 to prepare the valuation and file a report. We directed the matter to appear on 24th September, 2019. On 27th September, 2019 we extended the time to complete the valuation and file a report before us by 6th December, 2019. We have recorded in the order dated 27th September, 2019 that initially delay was caused due to failure of the appellant to comply with our direction dated 20th August, 2019. We were assured on behalf of the

appellant that all required documents would be made available to the valuer by 31st December, 2019. Thereafter on 22nd November, 2019 M/s. Ray & Ray, while finalizing the valuation, had sought for details of the shareholding of the company as per the table indicated in the e-mail dated 22nd November, 2019. It appears that due to the failure on the part of the appellant to furnish the said details, the valuation could not be completed. It further appears that the agreed remuneration of the Chartered Accountant firm has not yet been paid by either of the parties.

The appellant shall respond to the e-mail dated 22nd November, 2019 within a period of seven days from date and other enquiry, if any, by the aforesaid date; failing which we shall be constrained to direct the Chief Secretary of the State to be present to explain the non-compliance of our direction. The agreed remuneration of the Chartered Accountant firm along with GST shall also be paid within the aforesaid time. Both the directions are peremptory.

The matter stands adjourned till 10th January, 2020.

The time to file the valuation report by the Chartered Accountant firm is extended till 8th January, 2020. The valuation report shall be filed in a sealed envelope with the Registrar, Original Side to be produced before us on the adjourned date.”

“Date : 14th February, 2020.

The Court : The report filed by M/s. Ray & Ray, Chartered Accountant firm is taken on record. The parties shall obtain copies of the said report from the office of the Registrar, Original Side upon payment of charges within one week from date.

The matter will appear on 6th March, 2020. The parties shall make their submission on the said report on the adjourned date.”

“Date : 6th March, 2020.

The Court: Today, when we asked Mr. Ghosh to address us on the valuation of the shares prepared by M/s. Ray & Ray, Chartered Accountant appointed by us, Mr. Ghosh submits that the appellants wish to argue on merits. It is submitted that the claim is barred by limitation. We do not appreciate the said argument. It was the clear understanding of all that the appeal should be decided on the basis of the valuation of the shares and in aid of that, we have passed several orders. The first order was passed on 20th August, 2019 and the subsequent orders are towards 2 implementation of the said order. The delay in preparation of the report by the Chartered Accountant was attributable to the State of Rajasthan. The State of Rajasthan has not filed any affidavit taking exception to the

valuation prepared by the Chartered Valuer. Since now it is urged that the claim of the decree-holder is barred by limitation and there are other issues to be decided in the appeal, in view of the fact that our regular determination would not permit the appeal to be heard on a regular basis, we release the appeal from our list. The appeal shall not be treated as heard in part.”

The said firm of Chartered Accountants undertook the task of valuation. Both the parties participated before them. It made the valuation at Rs.640/- per share on the date of acquisition of the shares. At that point of time, the appellant took a u turn. They did not accept the report. They wanted to prosecute the appeal. The main point taken by them at that stage was that relating to limitation.

The division bench obviously surprised at the attitude taken by the appellants after the parties had caused the court to form an impression that they would accept the valuation of M/s. Ray and Ray put an amicable end to their dispute, released the appeal. In those circumstances, the appeal was heard by us.

Contentions

Mr. Malay Kumar Ghosh, learned Senior Advocate very skillfully argued the point of limitation. He began his argument by stating that shares were considered as goods under Section 2(7) of the Sale of Goods Act, 1930. He referred to Section 9(2) of the Act which states that in a contract of sale, where the price is not determined the seller could only claim a reasonable price. The dispute between the parties in this case arose out of sale of shares and the price thereof. Therefore, there was no application of Section 73 of the Indian Contract Act, 1872, relating to damages.

The relief sought by the respondents/plaintiffs in claim (d) of the plaint was in the nature of rescission of the contract and restitution of the respondents/plaintiffs to their original position. Under Article 59 of the Limitation Act, 1963 the period of limitation prescribed to institute a suit

for rescinding a contract was three years from the date the respondents/plaintiffs came to know the facts which entitled them to seek such rescission. Learned counsel submitted that on 18th December, 1974 the respondents/plaintiffs had become aware that M/s. B. D. Gargieya & Co., the firm of Chartered Accountants had determined the value of each share at Rs.11.50 per share, on perusal of the letter dated 18th December, 1974 of the appellants to them with which was enclosed the letter dated 31st October, 1974. The period of limitation expired on 18th December, 1977 whereas this suit was instituted on 5th July, 1978 much beyond the period of limitation. The time to seek a declaration to this effect is also three years from the date of accrual of the right to sue, under Article 58 of the Limitation Act, 1963. The respondents/plaintiffs could not seek the declaration. On 8th July, 1975 the difference between the amount determined by the Chartered Accountant and the amount already paid at the time of transfer of shares was paid to the respondents. The suit was filed on 5th July, 1978. According to Mr. Ghosh this did not save limitation under Section 19 of the Limitation Act, 1963, because on payment of the differential amount the entire debt stood paid. This section was attracted when payment of debt without fully discharging it was made before expiration of the period of limitation, so that a fresh period of limitation ran for that debt. Since, the entire liability of the appellant had been discharged, a fresh period of limitation did not run from 8th July, 1975.

Neither can this payment or any other document or conduct of the appellant be considered as an acknowledgment in writing before the expiry of the period of limitation, extending it for a fresh identical period under Section 18 of the Limitation Act, 1963.

Learned Counsel also contended that Mr. Lakhotia was not called and could not be considered as an expert witness under Section 45 of the Indian Evidence Act, 1872. He was required to substantiate his valuation of the shares under Section 65(g) of the said Act. That requirement had not

been made. Therefore, the evidence of Mr. Lakhotia had no relevance and weight.

Mr. Siddhartha Mitra, learned Senior Counsel for the respondents/plaintiffs made submissions which are recounted in brief below.

Under the agreement between the parties, the Chartered Accountant had to be nominated by the Indian Institute of Chartered Accountants. The contract did not contemplate unilateral nomination by the appellants. M/s. B. D. Gargieya & Co. had been unilaterally nominated by the appellant in breach of the said agreement. If at all a Chartered Accountant other than the one nominated by the Institute had to be appointed, it had to be made by consent of the parties and not unilaterally. The valuation was made by the said firm nominated by the appellant arbitrarily and erroneously. Such valuation was made without even consulting the respondents/plaintiffs. Such valuation was not binding on them.

The appellant had no intention to make over to the respondents /plaintiffs the market value or the fair value of the shares acquired by them. With this intention they entered into the contract. They carried out this intention by nominating the said firm of Chartered Accountants and ensuring that they valued the shares at a throw away price of Rs.11.50/- per share now. In those circumstances, the respondents/plaintiffs were entitled to rescind the contract. They so rescinded it by filing the suit. The contract for the above reason was avoidable and avoided by the respondents/plaintiffs. The respondents/plaintiffs were entitled to be paid the market value or fair value of the shares acquired by the appellant in 1973. The price was to be determined on the valuation made of each share by a valuer to be nominated by the Indian Institute of Chartered Accountants. The appellant proposed to value the shares at Rs.11.50/- per share finally on 8th July, 1975 when they made over the balance payment on the basis of such valuation to the respondents/plaintiffs. The cause of action for instituting

the suit for the balance price arose on that date. The suit was filed within three years thereof on 5th July, 1978.

The cause of action for instituting the suit for restitution also arose on the same day. The limitation for such suit is also three years. Restitution was ordered and the suit for restitution was filed. The suit based on this cause of action was also filed within three years, the start date being 8th July, 1975.

Learned Counsel argued on the basis of correspondence exchanged between the parties that till 8th July, 1975 the decision of the appellant to pay Rs.11.50/- per share had not attained finality. In fact, it became final on the part of the appellant on 8th July, 1975 because the respondents/plaintiffs accepted the payment under protest. Since it became final by the payment, the cause of action arose on 8th July, 1975. He also stated that although the valuation claimed by his clients in the plaint and attempted to be proved in evidence was the correct valuation of the shares, nevertheless, his clients would accept the valuation made by M/s. Ray and Ray, Chartered Accountants at the rate of Rs.640/- per share to put an end to this unusually long litigation of around 40 years. He said that the appellants were bound to accept the said valuation after having induced the division bench to believe that such valuation as ordered by the court could be accepted by them.

Limitation:

In **Sm. Sarat Kamini Dasi vs. Nagendra Nath Pal** reported in **AIR 1926 Cal 65** cited by learned counsel for the respondents, M.N. Mukerji, J. remarked: *“.....and it is also necessary that the cause should be complete, that is, all the facts must have happened which are material to be proved in order to entitle the plaintiff to succeed.”* The division bench approved the following passage of its earlier judgment in **Dwijendra Narain Roy vs. Jogesh Chandra De and Ors.** reported in **AIR 1924 Cal 600** and a full

bench decision of the Madras High Court in **Muthu Korakkai Chetty vs. Madar Ammal** reported in **AIR 1920 Madras 1** which ruled: “*the true test to determine when a cause of action accrued, is to ascertain the time when the plaintiff could have maintained his action to a successful result.*” A Special Bench of this court in **India Trades Corporation Vs. Union of India** reported in **32 CWN 971** saw the running of time from “*the event which is to be taken as completing a cause of action,*” also another dictum in **Muthu Korakki Chetty vs. Md. Madar Ammal** “*dating the cause of action from a date when the remedy is available to the party.*” All these decisions were again followed by this court in **India Trades Corporation vs. Union of India** reported in **AIR 1957 Cal 153**.

South East Asia Shipping Co. Ltd. vs. Nav Bharat Enterprises Pvt. Ltd. and Ors. reported in **(1996) 3 SCC 443** explained cause of action as “*.....a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise....*”.

In **State of Punjab & Ors. Vs. Gurdev Singh with State of Punjab & Ors. Vs. Ashok Kumar** reported in **(1991) 4 SCC 1** the same court interpreting the expression “right to sue” said: “*The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.*”

Under Articles 58 and 59 of the first schedule to the Limitation Act, 1963 time to file a suit to obtain rescission of a contract is three years from the knowledge of the plaintiff about the facts which entitle him to have the contract rescinded. Under this article, knowledge is material.

From the date of knowledge which can be thought of as completeness of the cause of action and accrual of the right to sue, time runs continuously. Under Article 113, the time limit is three years from the time when the right to sue accrues. This accrual of the right to sue has a direct connection with the cause of action.

The cause of action and claim made in the plaint is most important. Claim (b) of the plaint is for a decree for “Rs.4,34,21,553/- or alternatively Rs.1,43,62,22/” . The foundation of this claim is in paragraph 17 of the plaint. The value of each share claimed is Rs.795.60/-. The government’s decision to pay Rs.11.50/- per share, according to the respondents/plaintiffs was conclusively taken on 8th July, 1975 and the amount paid on that date. This date could be taken as when the cause of action was completed and when the right to sue accrued to the respondents/plaintiffs. Therefore, the claim for the balance amount of the price part paid in 1973 and the rest paid on the basis of the valuation made @ Rs.11.50/- per share i.e. Rs.1.50/- per share and accepted under protest, had to be claimed within 3 years from that date. Since the suit was filed on 5th July, 1978, it was within the period of limitation.

The alternative part of the case was based on the ground of rescission of the contract and restitution. The case of the respondents/plaintiffs as made out in Paragraph 19A of the plaint is that they entered into the agreement with the respondents/plaintiffs on the understanding that a fair valuation of the shares could be made by a nominee of the Indian Institute of Chartered Accountants. In breach of that agreement, the appellant had nominated M/S B. D. Gargieya & Co. to make the valuation with the design of obtaining an illusory valuation of the shares. This firm had no authority to do so, under the contract. At the time of entering into the agreement they had that intention in mind. Since they had induced the respondents/plaintiffs to enter into that agreement never intending to pay them any reasonable value for the shares, the respondents/plaintiffs were

entitled to rescind the agreement and seek restitution. Such rescission and restitution had been done within three years of knowledge of the said intention of the appellants when they made payment of the difference amount at the rate of Rs.1.50 per share on 8th July, 1975. The suit was filed within three years thereof.

In this case, there was no formal rescission of the contract by the respondents/plaintiffs. The filing of the suit itself is to be taken as the act of rescinding the contract. The question is: whether this rescission was made within three years of the knowledge of these facts? When did the cause of action arise?

On the background of the facts stated above, the question of limitation has to be considered.

According to Mr. Ghosh, it arose on 18th December, 1974. By the letter dated 18th December, 1974 enclosing another letter dated 31st October, 1974 the respondents/plaintiffs were made aware that the appellant had valued the shares at Rs.11.50/- per share. Since the suit was not filed within three years thereof and instituted on 5th July, 1978, it was barred by the law of limitation.

I cannot accept this submission. The subsequent correspondence including those referred by the learned single judge in his impugned judgment and order upto 25th January, 1977, referred to and discussed earlier in my judgment plainly show that this valuation of Rs.11.50/- was denied by the respondents/plaintiffs. In several letters they said that it was too low. The Government of Rajasthan even referred the objections to M/s. B. D. Gargieya & Co. to have their views. In its reference the government clearly left it open to the firm to review its decision. The firm responded by saying that it was not in a position to review its decision.

It was on 8th July, 1975 that the government made payment of the difference amount to the respondents/plaintiffs, acting on the valuation of

the said firm. It could be said that at that point of time the government treated the valuation as final and at all periods of time prior to that, the valuation was treated as provisional. In my considered opinion, the cause of action attained finality and the right to sue accrued to the respondents on 8th July, 1975. Time started running from that date. The respondents/plaintiffs instituted the suit on 5th July, 1978 within three years. Hence, it was within the period of limitation.

Sections 18 and 19 of the Limitation Act, 1963 do not apply to this case at all. I do not think the respondents' case is founded or can be founded on any acknowledgement by the appellant or any part payment. The appellant neither admitted their liability as perceived by the respondents nor any right of the respondents to claim an amount in excess of Rs.11.50/- per share. It is also not on the basis of reasonable price on a contract of sale where the price was not determined.

Valuation ordered by the Division Bench and challenge

The Chartered Accountant appointed by the division bench, M/s. Ray and Ray made their report on 10th January, 2020. In or about 24th November, 2020 the appellant filed an application for an order from the court discarding that report. It is admitted by the appellant in that application that they had submitted the "necessary documents" to the valuer. The valuer also considered the documents furnished to them by the respondents. All these documents were marked as Exhibits 'XX', 'YY and 'RRR' to the report. On this basis the said valuer valued the shares at Rs.640/- per share.

On a careful examination of the orders of the division bench dated 20th August, 2019, 27th September, 2019, 6th December, 2019, 14th February, 2020 and 6th March, 2020, we are of the view that at that point of time the parties through learned counsel on instruction had agreed that there was a need to achieve an early resolution of their share valuation dispute. They accepted the proposal of the court to revalue the shares by M/s. Ray and

Ray, Chartered Accountants. Since the firm was reputed and nominated by the court, it was expressly and/or impliedly agreed by the parties that the valuation done by this firm would be accepted. So much so, that the report dated 10th January, 2020 filed with the learned Registrar, High Court, Original Side on 14th February, 2020 was not even challenged by a substantive application when the earlier division bench last took up the matter on 6th March, 2020. At that point of time, it appears that the report was objected to. The appellant wanted to prosecute the appeal on its merits which included challenging the claim of the respondents on the ground of limitation. At that point of time by an order dated 6th March, 2020 the division bench released the appeal. The application challenging the report came as late as November, 2020.

This conduct of the appellant is not at all acceptable to this court.

Having made the court and the respondents believe that the valuation made by M/s. Ray and Ray would be accepted by them, the appellants are now estopped after filing of the report by the firm to resile from the representation they made before the court that they would accept the valuation made by the firm.

FINDINGS ON VALUATION:

To satisfy the conscience of the court it needs to arrive at an independent conclusion as to what should be a fair and reasonable valuation of the shares in keeping with the spirit of the agreement between the parties, it is essential to know and appreciate the claim of the respondents/plaintiffs in that behalf and the evidence that the parties led in support of this claim or to disprove it. In paragraph 12 of the amended plaint, the respondents/plaintiffs stated that according to them the reasonable valuation of each share would be Rs.795.60/-.

Paragraphs 17 and 12 are set out below:

“17. There is now due and owing from the defendant No. 1 to the plaintiffs a sum of Rs.4,34,21,553.00 or alternatively Rs.1,43,52,222.00 in respect of the shares mentioned in the Schedule “A” on the basis of the difference between Rs.190/- Rs.795.60 and Rs.11.50 or Rs.70.50 and Rs.11.50 per share for 55,378 shares which the defendant No. 1 failed and neglected to pay in spite of demands.”

“12. The plaintiffs were not heard and had no opportunity of being heard and/or were not allowed to make representations at the time of making of the aforesaid purported valuation by the valuer and the plaintiffs deny the factum and validity of the said valuation and state that a sum of Rs.11.50 paise could not and cannot be the market value of the shares for the face value of Rs.10/- each. The plaintiffs state and submit that in any event they were entitled to a bearing in the matter of valuation. The plaintiffs state that the valuation made without giving a hearing to the plaintiffs and without giving any opportunity to them to make any representation is bad in law and not binding on the Plaintiffs. The Plaintiffs were not informed even on what basis and taking consideration of what factory, the valuation was made by the said valuer wrongfully and illegally appointed by the Defendant No. 1. Further and in any event, the said purported valuation was unreasonable and improper. The plaintiffs call upon the defendants to disclose the basis of the said purported valuation which is still unknown to the plaintiffs and reserve their rights to furnish further particulars regarding the valuation after such discovery. On the basis of the material available with the plaintiffs the reasonable valuation and/or the price of the said shares at the relevant time even without taking into account the factory mentioned in paragraph 14 hereunder would be Rs.795.60 Per share.”

Now, the evidence.

The first witness on behalf of the respondents/plaintiffs was Jai Kumar Karnani who is described in the cause title of the plaint as Administrator to the State of Indra Kumar Karnani. He did not lead any evidence on valuation.

The second witness for the respondents/plaintiffs was Naresh Kumar Lakhotia. Mr. Lakhotia described himself as a practising Chartered Accountant. He made the valuation on the basis of the balance sheet of the company from 1971 onwards supplied to him (Q.10, Q.15 Xn). He also

relied upon the minutes of the Board meeting, director's report, auditor's report and so on (Q.26 to 28 Xn). The valuation made by him was on Net Asset value method (Q.30 Xn). This method had been adopted by him on the basis of a study note received by him from the Institute of Chartered Accountants (Q. 45 Xn). In answer to Q.66 Xn, he stated that based on his calculation he valued each share at Rs.723 and added 20% with on account of "controlling interest". According to him the final valuation was Rs.874/- per share.

In cross-examination he said that the valuation was made by him taking "the chunk of shares" into account (Q. 102 Xxn). He took into account the liability of the company (Q. 126 Xxn). He considered the notes of accounts and the marketability of the shares (Q. 132 and 133 Xxn), the profit of the company (Q. 134 Xxn) and the mine reserves (Q. 142 Xxn). He opined that since the shares constituting the controlling interest of the company were sold, the purchaser acquired a special right. He therefore added an extra premium of 20% on the value of the shares. Adding the premium the value would be Rs.874/- per share.

The appellant/ defendant produced another Chartered Accountant, Mr. Megh Raj Jain as witness. He was shown the reports/valuation made by M/s. B. D. Gargieya & Co. and Mr. Lakhotia. He more or less agreed with the valuation made by the firm. According to him, the net asset valuation method was not correct. (Q. 24 Xn.). Yield method or earning per share method should have been used. (Q. 35 Xn). In his estimate, the value of each share was Rs.15 to 20 as on 31st March, 1973. (Q. 37 Xn). In cross-examination, he said that most of the mines were in a depleted stage. (Q.111 Xxn). The method of determining the mine reserve value by Mr. Lakhotia was incorrect. (Q. 226 Xxn).

Now, let me consider the submissions of Mr. Ghosh.

Let us assume that both Mr. Lakhotia and Mr. Jain could not have been called as an expert witness under Section 45 of the Indian Evidence Act,

1872. It is erroneous to think that accounts could be only proved by an expert or that because Mr. Lakhotia or Mr. Jain were not experts within the meaning of Section 45, their evidence had to be disregarded.

A Chartered Accountant is competent professionally to value shares. In arriving at the value of a share in a company there is no empirical standard by which only one value would be true and the others incorrect. It is possible for valuation to differ from valuer to valuer. Using their skills in examination of accounts valuation of assets, liabilities etc., each of the Chartered Accountants has arrived at a value for a share on the date of its sale in 1973. There is a huge discrepancy between two valuations made by party witnesses. But, I do find that detailed reasons have been given to support each valuation. There is no third witness to concur with either of the two valuations or to disagree with both.

The learned single judge had some reasons not to accept either of the two valuations. In those circumstances, he directed valuation to be done by an independent valuer to be selected amongst the names proposed by his lordship, by the appellant.

The division bench at the invitation of the parties had appointed one of the valuers proposed by the learned single judge, M/s. Ray and Ray, who valued the shares at Rs.640/- per share.

Considering the circumstances discussed above, after 40 years of litigation, it would not be judicious on our part to order a fresh valuation of the shares in 1973. This would not only delay but completely defeat justice. Rs.640/- per share is much lower than the claim with regard to valuation made in the plaint and the valuation made by Mr. Lakhotia. It is accepted by the respondents/plaintiffs. In my opinion, it is fair and reasonable and supported by strong reasons and evidence. I am minded to accept that valuation and thus put an end to this litigation.

In those circumstances, this appeal and cross-objection are disposed of by declaring that the respondents/plaintiffs are entitled to Rs.640/- per share sold by them to the appellant and directing that each of the respondents/plaintiffs be paid by the appellant no. 1 Rs.640/- per share of Bikaner Gypsums Ltd. (subsequently Rajasthan State Mines and Minerals Ltd.) sold by him to the appellant no.1 as valued by M/s. Ray and Ray less Rs.11.50/- per share already received by him/her within eight weeks of communication of this order. Considering the appellant is the government of Rajasthan, the respondents/plaintiffs shall only be entitled to interest at the rate of 5% simple interest per annum without yearly rests on the said amount from 8th July, 1975 till the date of payment.

The impugned preliminary judgment and decree dated 14th August, 2012 is modified to the above extent. In the facts and circumstances, the modified preliminary judgment and decree shall be treated as the final decree. The suit is decreed accordingly.

The application (GA 6 of 2020) is also disposed of by this order.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(MD. NIZAMUDDIN, J.)

(I. P. MUKERJI, J)